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Supreme Court, U.S.
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No. 15-8366

IN THE

Supreme Court of the United States

SHAWN PATRICK LYNCH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court set forth a three-step process for evaluating whether peremptory strikes were used in an discriminatory manner: (1) the defendant must make a prima facie showing of discrimination, (2) the State must provide a race-neutral reason for the strike, and (3) the court must determine if the defendant demonstrated purposeful discrimination.

2. Courts have split regarding how to address a trial court's failure to conduct the third step—an error that occurred here. Three approaches exist: (1) independently review the record and vacate the conviction when the record does not support the proposed race-neutral reasons, (2) remand to the trial court to conduct the third step, and (3) consider a ruling implicit and defer to that implicit ruling.

   What is the proper appellate procedure to address a trial court's failure to conduct the third *Batson* step?

3. Under *Simmons v. South Carolina*, 512 U.S. 154 (1994), when the only legal alternative sentence to death is life without the possibility of parole, upon request, the trial court must inform the jury that life without parole is the only alternative. Possible legislative changes or commutation do not obviate this requirement. While Arizona abolished parole in 1994, and life without parole is the only legally available alternative to death, the Arizona Supreme Court has continuously refused *Simmons* instructions by relying upon the availability of commutation. Has the Arizona Supreme Court decided this question in a manner that conflicts with *Simmons* and its progeny?

4. The Arizona Supreme Court had previously found that the prosecutor in this case, Juan Martinez, committed misconduct in at least two prior cases. In this case, Martinez committed misconduct on approximately seventeen occasions during trial, including two types of misconduct that the Arizona Supreme Court had previously addressed. Is a defendant's Due Process right to a fair trial secure when a prosecutor with a history of misconduct commits misconduct on several occasions through the defendant's trial?

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A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling. 2

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons. 4

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STATEMENT OF THE CASE

Lynch relies upon the Statement of the Case presented in the Petition.

REASONS FOR GRANTING THE WRIT

I. During *Batson*'s third step, trial courts determine if the defendant demonstrated purposeful discrimination. Courts are split regarding how to resolve a trial court's failure to conduct the third step. This Court should clarify that independent review is proper because independent review best protects a defendant's and the public's Equal Protection rights under the Fourteenth Amendment. Applying this test, this Court should vacate Lynch's death verdict.

The State's brief illustrates why this Court should accept this case in this procedural posture. To argue that several jurisdictions use an implicit ruling approach, the State relies heavily upon Anti-Terrorism and Effective Death Penalty Act (AEDPA) cases. *See* Br.Opp., 7-8 (citing *Stevens v. Epps*, 618 F.3d 489 (5th Cir. 2010); *Edwards v. Roper*, 688 F.3d 449 (8th Cir. 2012); *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006)). But AEDPA cases provide little insight when the claim is that a split exists.

AEDPA relief can only be granted if a state decision "was based on an unreasonable determination of the facts" or "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d). Federal law is not clearly established "so long as fairminded jurists could disagree on the correctness of that decision." *Harrington v. Richter*, 562 U.S. 86, 88 (2011) (quotation marks and citation omitted). Thus, a split strongly suggests there is no "clearly established Federal law" on an issue. *See Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006).

A case on direct appeal is the best vehicle to resolve the split raised in this case. A case on direct appeal is ripe, clearly presents the split, and is not obfuscated by AEDPA deference.

Lynch's case, as it currently stands, presents the ideal case for this Court to resolve this split. This Court should not await a later procedural posture.

A. Because this Court has not yet indicated how lower courts should resolve the failure to conduct the third step of a *Batson* analysis, jurisdictions have created three different approaches: (1) independent review, (2) remand, and (3) deference to an implicit ruling.

First, the State attempts to portray the implicit ruling approach by pointing to a number of cases that have approved of implicit rulings. *See* Br.Opp., 7-8. The existence of such cases is no surprise. Lynch agreed the implicit ruling approach is used. Even if the State's argument is accepted, a split still exists. The Ninth Circuit still independently reviews and the Third, Sixth, and Seventh Circuits still remand. Indeed, the State recognizes the Sixth and Seventh Circuits endorse the remand approach. *See* Br.Opp., 10 (citing *U.S. v. Rutledge*, 648 F.3d 555 (7th Cir. 2011); *U.S. v. McAllister*, 693 F.3d 572 (6th Cir. 2012)). Thus, even if the exact balance of the split shifts, the split still exists.

But the balance does not shift because the State's cases fall largely into one of two errors: the cases predate *Snyder v. Louisiana*, 552 U.S. 472 (2008), or apply AEDPA. First, Lynch's petition identified the importance of *Snyder v. Louisiana*, 552 U.S. 472. *See* Pet.Cert., 10, 13-14. In *Snyder*, this Court independently reviewed the record to determine if the prosecutor's proffered race-neutral reasons for a strike were supported and found the proffered reasons implausible and pretextual. 552 U.S. at 477-85. Courts have read *Snyder* to direct the proper relief in absence of *Batson* findings. *See* Pet.Cert., 13.

In light of *Snyder*'s importance, cases that predate *Snyder* give little assistance. Thus, *McKinney v. Artuz*, 326 F.3d 87 (2d Cir. 2003); *Messiah v. Duncan*, 435 F.3d 186 (2d Cir. 2006); *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006); and *Jacox v. Pegler*, 665 N.W.2d 607 (Neb. 2003), all cited by the State, provide little insight. Since *Snyder*, the Second Circuit has applied a

remand standard and the Eleventh Circuit has applied independent review. *See Dolphy v. Mantello*, 552, F.3d 236, 240 (2d Cir. 2009); *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252 (11th Cir. 2009); *Adkins v. Warden, Holman CF*, 710 F.3d 1241 (11th Cir. 2013). Nebraska does not appear to have addressed the issue since *Snyder*.

Additionally, several cases cited by the State shed little light because they are AEDPA cases. *See Edwards v. Roper*, 688 F.3d 449, 453 (8th Cir. 2012) (reviewing under AEDPA); *Stevens v. Epps*, 618 F.3d 489, 493 (5th Cir. 2010) (same); *Hightower v. Terry*, 459 F.3d 1067, 1068 (11th Cir. 2006) (same). As noted above, AEDPA authorizes relief only where there is a violation of "clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Where there is a split, Federal law is generally not "clearly established." *See Hall*, 692 F.3d at 799; *Evenstad*, 470 F.3d at 783.

Edwards demonstrates just how difficult it is to obtain AEDPA relief. In *Edwards*, the defendant raised two *Miller-El v. Dretke*, 545 U.S. 231 (2005) claims: the state court applied an overly-rigorous similarity standard to the comparison of jurors and the court improperly substituted reasons on the prosecutor's behalf. *See Edwards*, 688 F.3d at 455-56. The Eighth Circuit rejected both arguments because *Miller-El v. Dretke* was decided two years after state proceedings ended. *Id.* at 456. Before *Miller-El v. Dretke*, neither issue was "clearly established Federal law." *Id.* at 455-56; *see also Stevens*, 618 F.3d at 499 (holding AEDPA required deference to state court's determination that implicit finding was made and to the implicit ruling itself).

In light of how difficult the AEDPA standard is when circuit splits are involved, it makes sense that the State found AEDPA cases approving the implicit ruling approach. But this does not reflect the practices of the circuits; this reflects the deference required by AEDPA.

B. To resolve this split, this Court should clarify that where a trial court has failed to follow *Batson v. Kentucky*, appellate courts must independently review the record and order a new trial when the record does not support a prosecutor's proffered race-neutral reasons.

In his Petition, Lynch explored the legal and policy reasons why this Court should endorse the independent review standard. Pet.Cert., 13-15. Lynch also explained why the implicit ruling approach was constitutionally problematic. *Id.* at 16-19. While remand is not the best standard, it is better than the implicit ruling approach. *Id.* at 15-19.

None of the State's arguments address this analysis. The State does not explain why the implicit ruling approach is preferable; the State merely points to its existence. Instead, the State focuses the remaining argument on Lynch's third contention: that independent review should result in a new trial. Thus, Lynch will not rehash the advantages and disadvantages of each approach. As the State noted, a "decision that decides an important federal question in conflict with another state court of last resort or United States court of appeals" is a compelling reason to grant a writ of certiorari. Br.Opp., 5. The existence of a split is good cause to review this case.

The State's step-three analysis, however, illustrates why this Court should reject implicit rulings. The State's third-step analysis largely seeks to justify the strike because it satisfied the second prong. *See* Br.Opp., 9-10. This analysis errantly conflates steps two and three—an error this Court clarified is impermissible in *Purkett v. Elem*, 514 U.S. 765, 766 (1995). In *Purkett*, the prosecutor's proffered race-neutral reasons were similar to those offered here: hair length and facial hair. *Id.* The Court of Appeals found the justification pretextual under the second step. *Id.* at 767. This Court concluded the appellate court erred "by combining *Batson*'s second and third steps into one ...." *Id.* at 768.

If the trial court does not conduct the third step, the court inherently combines *Batson*'s second and third steps. The trial court will not have considered a challenging party's third-step

arguments or whether the proffered race-neutral reasons are reasonable, credible, or linked to accepted trial strategy. And this is precisely why the rationale of the vast majority of jurisdictions that either independently review or remand is so persuasive: "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which [courts] can defer." *Rutledge*, 648 F.3d at 559; *see also McAllister*, 693 F.3d at 582; *Green v. LaMarque*, 532 F.3d 1028, 1031 (9th Cir. 2008).

C. Applying the correct test—independent review—this Court should vacate Lynch's sentence.

The State's second argument is that neither independent review nor remand leads to a different result. The State's argument, however, confuses the second and third *Batson* steps.

During *Batson*'s second step, any explanation will suffice, no matter how implausible. *Purkett*, 514 U.S. at 767-68. Thus, a decision that stops at the second step does not comply with *Batson*. As the State noted, during the third step a court must determine if the race-neutral reasons are credible. *See* Br.Opp., 7 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003)). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. at 339.

The State's argument does not address any of these factors. *See* Br.Opp., 9-10. The State does not discuss demeanor, reasonableness, or whether the proffered reasons have a basis in accepted trial strategy. *See id.* Instead, the State's argument suggests that compliance with the second step is adequate; because Lynch did not dispute that Juror 32 had long hair or that Juror 34 had visible tattoos, the strikes were legitimate.

This assertion begs the question of whether Lynch had an opportunity to engage in such a dispute. The trial court allowed the strikes without giving Lynch the opportunity to rebut the

proffered race-neutral reasons. Appx. J, 15. Faced with a contrary ruling, Lynch quickly and efficiently objected to avoid waiver. *See U.S. v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) (*Batson* error waived if challenging party does not dispute proffered race-neutral reasons); *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023, 1027-28 (4th Cir. 1998) (same); *U.S. v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (same).

However, even if the State's argument is given its full weight, it carries none. Presuming Juror 32 had long hair and Juror 34 had visible tattoos, the State does not argue either rationale is reasonable or finds a basis in accepted trial strategy. Rather, the State merely distinguishes *Miller-El v. Dretke* because this prosecutor did not ask anyone about tattoos or long hair. Br.Opp., 9-10.

But this argument strikes at the heart of any accepted trial strategy. If the prosecutor had a legitimate strategy reason for striking people with tattoos, the prosecutor would have asked questions to identify who had tattoos. A prosecutor cannot shield discriminatory strikes as strategy when the prosecutor has not demonstrated any legitimate interest in the issue.

And none of this even touches on the strike of Juror 32. Even if Juror 32 had long hair or poor hygiene, the prosecutor did not offer any trial strategy reason for striking a person with long hair or poor hygiene.

The State also ignores two additional arguments weighing in Lynch's favor. First, the record undermined the prosecutor's proffered reason for striking Juror 32. The prosecutor argued he also struck Juror 299 partially because of hygiene reasons. Appx. J, 13-14. But the prosecutor only argued to strike Juror 299 because of 299's attitudes toward lying. Appx. I, 128-29. The prosecutor's unsupported attempt to bootstrap in a new reason for striking Juror 299 undermines the legitimacy of his strike of Juror 32.

Second, the State ignores this Court's guidance in *Purkett*. While long hair and facial hair is a satisfactory second-step reason, this Court referred to the reason as silly, implausible, and fantastic. 514 U.S. at 768. This rings true here. Striking jurors based on perceived grooming and hygiene did not have any basis in accepted trial strategy. This prosecutor did not link hygiene or hair length to trial strategy. He did not explain why people with long hair might be more skeptical of the State's evidence. And he did not describe why people with facial hair might be more likely to sympathize with Lynch.

The prosecutor's reason, as silly and implausible as it is, satisfied the second step. That is all trial court found: "The Court finds that the reasons given for the State's striking Juror numbers 8, 32, 34, 49 and 255 are all race neutral and I will allow the strikes." Appx. J, 15. The trial court did not evaluate the prosecutor's credibility; the court stopped after step two.

Finally, the State's argument that remand merely requires explicitly stating the implicit is incorrect. Remand would require the court to conduct the third *Batson* step. Lynch could challenge the prosecutor's proffered race-neutral reasons, compare Jurors 32 and 34 to unchallenged jurors, and require the court to engage in the full third-step process. While the court may reach the same result, it is neither a sure bet nor a reason to deny review.

CONCLUSION

The trial court failed to conduct the third *Batson* step and there is a split amongst courts regarding the proper remedy. The Arizona Supreme Court deferred to an implicit ruling—an approach soundly criticized. For the reasons stated in the Petition and this Reply, this Court should grant review and hold that independent appellate review is proper when the trial court has not conducted the third *Batson* step.

II. Because Shawn Lynch was ineligible for parole and the prosecution placed Lynch's future dangerousness at issue, Lynch was entitled to an instruction on parole ineligibility under *Simmons v. South Carolina* and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. To justify the trial court's refusal to read a *Simmons* instruction, the Arizona Supreme Court relied upon the availability of clemency—a form of release irrelevant to *Simmons*.

In his Petition, Lynch evaluated several issues. The State isolates its arguments to just the first: Lynch was entitled to a *Simmons* instruction; Lynch was not eligible for parole and future dangerousness was at issue.

The State's primary argument retreads ground rejected by this Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The State recognizes that parole has been abolished. Br.Opp., 12. Nevertheless, the State argues that parole was legally available because, "nothing prevents the legislature from creating a parole system in the future for which Petitioner would have been eligible had the court sentenced him to life with the possibility of release after 25 years." Br.Opp., 12. This argument ignores *Simmons*.

In *Simmons*, South Carolina also argued that the legislature could change the law to allow parole in the future. *Simmons*, 512 U.S. at 166. This Court dismissed the argument: "To the extent that the State opposes even a simple parole-ineligibility instruction because of future hypothetical future developments, the argument has little force." *Id.*

The State offers no reason to give this argument new weight. Instead, the State focuses its energy on the fact that the sentencing statute references parole as an unavailable release mechanism for persons sentenced to life without the possibility of release. First, the presence of the word "parole" does not indicate that parole is available to Lynch—the Arizona Supreme Court ruled that parole was only available to people who committed an offense before January 1, 1994. *State v. Lynch*, 357 P.3d 119, ¶ 65 (Ariz. 2015). While A.R.S. § 13-703(A) does not prohibit Lynch from being released on parole, A.R.S. § 41-1604.09 does. *See id.*

Second, the nature of the State's argument would merely raise the *Simmons* issue in a different light:

> Can a state that has abolished parole circumvent the requirements of *Simmons* by merely failing or refusing to delete every reference to parole?

Under this Court's jurisprudence, the answer is no. This Court's has consistently focused on whether parole is available to the defendant. *See Simmons*, 512 U.S. at 166-69; *Ramdass v. Angelone*, 530 U.S. 156, 169 (2000); *see also Solem v. Helm*, 463 U.S. 277, 300-01 (1983). When there is no possibility of parole—as there is not in a state that abolished parole—a *Simmons* instruction is required if the prosecutor places the defendant's future dangerousness at issue. *See Simmons*, 512 U.S. at 168-69; *Ramdass*, 530 U.S. at 165.

The State's second argument—that a defendant cannot presentence himself—ignores the procedural posture of Lynch's case. *See* Br.Opp., 13. While Lynch cannot presentence himself, Lynch's request was the product of his desire to reraise the *Simmons* issue. The first trial court granted the prosecutor's Motion to Preclude Testimony Concerning Availability of Parole. *See* Appx. L; *see also* Appx. K (motion). Although Lynch raised *Simmons* on his first appeal, Appx. M, 75-78, the Arizona Supreme Court did not rule on the issue, *State v. Lynch*, 234 P.3d 595, ¶¶ 82-89 (Ariz. 2010). Thus, in his subsequent sentencing, the initial ruling was still binding. Lynch merely attempted to raise the issue in a different light.

CONCLUSION

Future dangerousness was at issue and Lynch was not eligible for parole. Nonetheless, the trial court rejected a *Simmons* instruction and prevented Lynch from presenting testimony or argument regarding parole ineligibility. And the Arizona Supreme Court, continuing its practice of ignoring *Simmons*, affirmed. This Court should accept this matter and order a new trial where the trial court instructs the jury that Lynch is not eligible for parole.

III. **Shawn Lynch's Due Process right to a fair and reliable capital penalty phase, guaranteed by the Fifth and Fourteenth Amendments, was violated by the prosecutor's repeated and persistent misconduct.**

The State's sole argument is that the Arizona Supreme Court did not err by concluding Lynch received a fair trial. Br.Opp., 14-16. This issue is adequately presented in the Petition.

Respectfully submitted this 7th day of April, 2016.

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MIKEL STEINFELD deposes and says:

I am a member of the Bar of the Supreme Court of the United States. On the 7th day of April, 2016, I delivered a package containing an original and ten copies of Petitioner's Reply in Support of Petition for Writ of Certiorari in the above-captioned case, addressed to the Clerk of the Supreme Court of the United States, to FedEx for overnight delivery.

Respectfully submitted this 7th day of April, 2016.

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SUBSCRIBED AND SWORN to before me this 7th day of April, 2016.

LUCIA M. TABER
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
May 2, 2017

_____
NOTARY PUBLIC

My commission expires:

May 2, 2017